

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



FEB 18 1931

IN THE

Court of Appeals of the ~~District of Columbia~~

Case No. 5312.

CLERK.

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OCTOBER TERM, 1930.  
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THEODORE J. PERRY, *Appellant*,

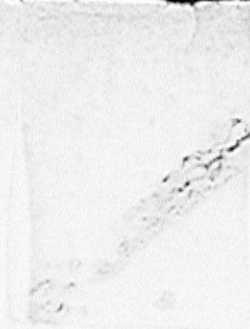
*vs.*

ZACKARY WILSON, ADMINISTRATOR D. B. N. OF THE ESTATE  
OF NELLIE WILSON PERRY, DECEASED, *Appellee*.

—  
**BRIEF FOR APPELLEE.**  
—

CORNELIUS H. DOHERTY,  
*Attorney for Zackary Wilson, Ad-  
ministrator d. b. n. of the Estate of  
Nellie Wilson Perry, Deceased.*

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*vs.*

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**BRIEF FOR APPELLEE.**

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**STATEMENT OF THE CASE.**

Theodore J. Perry, the appellant, was appointed the administrator of the Estate of Nellie Wilson Perry, deceased, on January 20, 1930, and collected on behalf of the estate the various funds in the banks and elsewhere in her name at the time of her death and which, together with the jewelry and household effects amounted to \$5740.90. The money on deposit in the Riggs Bank, to wit, \$4040.40, being in the name of Nellie Wilson and not in the name of Nellie Wilson Perry.

On, to wit, April 22, 1930, the appellant filed a bill in the Supreme Court of the District of Columbia

claiming a resulting trust in all the real estate owned by the decedent and also a resulting trust in all the personalty alleged in his petition to belong to the Estate of Nellie Wilson Perry, deceased, and making himself a party defendant to the said bill as the administrator of the Estate of Nellie Wilson Perry, deceased.

On, to wit, May 1, 1930, Ernest Wilson, a brother of the decedent, filed a petition to remove the appellant as administrator of the estate and after a hearing on the said petition the Court on June 5, 1930, signed an order removing the said appellant as administrator of the Estate of Nellie Wilson Perry and appointing Zackary Wilson, in his place and stead and requiring the said appellant to forthwith account and transfer the assets to his successor in office. The appellant was present in Court with his attorney and in open Court noted an appeal to this Court from this order. A petition for a rehearing filed on June 4, 1930, the day before the order was signed, would appear to have been disposed of by the order of June 5, 1930, but remained pending on the calendar without disposition until disposed of on a motion to strike by an order dated July 9, 1930, and to which order an appeal was noted in open Court by the appellant.

A petition for a rule to show cause filed on July 9, 1930, and an order entered thereon on July 9, 1930, requiring the said appellant on a day certain to show cause why he should not be adjudged in contempt of Court for his failure to abide by the order of June 5, 1930, and the said matter continued on various occasions until the said rule lapsed with the death of the appellant.

The appellant filed a petition praying the removal of the appellee as the administrator d. b. n. of the Estate of Nellie Wilson Perry, deceased, on the ground that he had been convicted under the National Prohibition Act and sentenced to sixty days in jail or pay a fine of \$100.00 and a rule to show cause issued thereon. This rule discharged by an order dated July 30, 1930.

Appellant filed a final account on July 29, 1930, wherein appellant claimed an attorney's fee of \$250.00, a commission of 5% and a bond premium of \$12.00. Appellant further claimed that he held the balance until a final hearing was had in the pending equity cause and in derogation of the order of June 5, 1930, and appellee's exception to this account was sustained. On August 9, 1930, appellant filed an amended final account and on August 26, 1930, an order entered sustaining the exceptions filed by appellee and denying the petition for attorney's fee and commission.

On August 28, 1930, an order entered permitting appellant to proceed in *forma pauperis* and without the necessity of filing a bond for costs.

An order was entered in this Court based on a copy of the affidavit filed in the Supreme Court of the District of Columbia permitting appellant to proceed in this Court without prepayment of costs.

### **ARGUMENT.**

#### **Appeal Not Taken In Time.**

It appears that appellant's assignments of error numbered 1, 2, 3, 4, 5, 7, 8 and 9 refer to the order of June 5, 1930, and it is the contention of the appellee

that the said order was a final order and appealable, and no appeal having been perfected until August 28, 1930, and eighty-four days having elapsed that this order had become a final judgment from which no appeal could be taken.

In *King v. Harrington*, 35 Appeals at page 111, it is said:

“A decree may be final in the sense that it may be appealed from, although not final in the strict technical sense of the term. If it disposes of all questions within the pleadings, and nothing remains but to adjust an account between the parties in the execution of the decree, it is final; but if a reference is made for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final.”

In *Rector v. United States et al.*, 20 Federal (2nd) 845, it is said:

“An order is final and appealable if it is of a character which settles substantial rights, which makes no reservation as to its effect, which is operative in a way affecting rights at once, and before or irrespective of a final decree in main litigation.”

The order of June 5, 1930, terminated appellant's rights in this cause and operated as a final judgment from which he could appeal and did note an appeal in open Court and a cost bond set at \$50.00.

This order required the appellant to forthwith account and turn over the assets in his hands as administrator to his successor. The Code does not make

any allowance for the commission of an administrator or executor who is removed for his own wrong and assumes that it rests in the discretion of the Court. No statement was made at the time of the signing of the order concerning a commission or a claim for attorney's fee but the order required the appellant to turn over all the assets then in his hands.

All the assignments of error relied upon by the appellant, with the exception of assignment of error numbered six, refer to the order of June 5, 1930, and the subsequent orders were merely an incident of the power of the Court to enforce the judgment entered under the order of June 5, 1930.

#### **ASSIGNMENTS OF ERROR NOT SUSTAINED BY THE RECORD.**

1. Appellant's first assignment of error is incorrect in that the order of June 5, 1930, was based upon the prayer of the petition filed on May 1, 1930.

2. There is no order in the record sustaining appellant's second assignment of error.

3. There is nothing in the record to sustain appellant's third assignment of error.

4. The record shows that the appellant was present in Court when the order of June 5, 1930, was signed and appellant noted an appeal in open Court and there is nothing in the record to sustain this assignment.

5. It appears by the record that the petition to reconsider the rule was filed on June 4, 1930, and that therefore this petition was taken into consideration at

the time the order of June 5, 1930, was signed, or in either event it appears that the petition and motion to re-consider was not pressed until after the term of Court at which the order was signed and therefore a rehearing could not be granted after the term of Court and appellant's fifth assignment of error must fail.

6. In sustaining appellee's motion to discharge the rule issued against him to show cause why he should not be removed as administrator d. b. n. because appellee had been convicted of a violation of the National Prohibition Act and sentenced to serve sixty days in jail or pay a fine of \$100.00 is assigned as appellant's sixth assignment of error. Appellant relies on Section 261 of the District of Columbia Code in which it states that no letters shall be granted to a person convicted of an infamous crime.

The question as to whether a conviction under the National Prohibition Act was a conviction of an infamous crime was referred to in *Grader v. United States*, 21 Federal (2nd) 513 in which *Bride v. Powers* 263 U. S. 4, was cited as follows:

"The Statute provides that, for the offence here charged, the offender shall be fined not more than \$1000.00 and imprisoned not exceeding six months, National Prohibition Act, Sections 29-41, Stat. 316. The Statute excludes the imposition of hard labor or imprisonment in a penitentiary. Under the contention of appellant, both would be imposed. The offence charged in this information, as this Court has repeatedly held in considered opinions after exhaustive arguments, are not infamous. . . . There is no moral turpitude in them; they are *mala prohibita* but they are not *mala in se*."

The lower Court was therefore correct in ruling in favor of the appellee.

It is further apparent that the appeal from this order was not perfected in time, more than twenty days having elapsed in which appellant had to perfect his appeal.

7. The record discloses that appellant admitted that the legal ownership of all the property was held by him as administrator but that he had an equity therein by way of a resulting trust. By the order of June 5, 1930, he was merely required to turn over the legal estate so held by him as the administrator of the estate of Nellie Wilson Perry, deceased, to Zackary Wilson, the administrator d. b. n.

8. There is nothing in the record to sustain appellant's eighth assignment of error. The order of June 5, 1930 being based upon the petition filed May 1, 1930, and referring to no other petition.

9. Appellant's ninth assignment of error is similar to the seventh assignment of error.

10. Appellant's 10th, 12th and 13th assignments of error are in effect similar. They assign as error the fact that the Court did not allow appellant his commission, attorney's fee and bond premium.

Appellant was required to file this account by order of June 5, 1930, and if an attorney's fee or commission was to be requested it should have been noted at that time. Appellant was required, by the order of June 5, 1930, to turn over all the assets then in his hands and the filing of this account was being accomplished merely by the power that the Probate Court has in which to enforce its orders.

Conceding that the question of attorney's fee, commission and bond premium were properly before the Court at the time the account was passed upon, the appellant has failed to file a Bill of Exceptions and this Court will assume that the matter before the lower Court was sufficient to justify the Court in making the order or decree from which the appeal was taken. Such was the ruling of this Court in *McDonald v. Maxwell*, 55 Appeals 375, and while this case was reversed in the Supreme Court of the United States in 274 U. S. 91, it did not affect the law so expressed. It was merely the misapplication of the law, Mr. Justice Sanford saying:

“Here the exception raised no issue as to the matters of fact stated in the executor's account but a question of law merely. There is no recital in the record that the order was based upon any evidence submitted; no reference to the hearing of any evidence; and nothing we think, from which any inference can be rightly drawn that the Court made an investigation of any matters not shown by the executor's account, or allowed the commission on the stock dividends on any ground other than that as a matter of law the receipts of the stock dividends constituted an ‘increase in principle’ of the estate.”

It might reasonably be assumed in this case that the Court investigated the entire record and from the record and statement in the exceptions to the final account it appears that the reason for the ruling of the Court was that the appellant had become the administrator merely to get control of the property and having done so, he claimed it for his own and had done this, not as administrator for the estate, for a pur-

pose of his own and therefore not entitled to a commission and having employed an attorney merely to further his own personal ends he should be required to pay this attorney out of his own funds. The appellant, as the record now stands being entitled to one-half of the personalty in the estate.

11. There is nothing in the record to sustain appellant's 11th assignment of error.

12. Appellant, in every account filed in this action, lists the jewelry as held by him in his administrative capacity. He claims no legal right to any of the jewelry until the very final account. It is true that he claimed an equity in all of this property but he did not even claim this until all the property was in his possession. To require the appellant to turn over the possession of property which he admits to be held in an administrative capacity is not in derogation of any equitable right he might have. The administrator d. b. n. was required to furnish a proper undertaking in this matter and he has sufficient notice of the claim of the appellant to this property and this disposes of appellant's 14th assignment of error.

13. The record does not sustain appellant's 15th assignment of error. A rule was issued to show cause why he should not be adjudged in contempt for his failure to account and turn over the assets in accordance with the order of June 5, 1930, but a contempt order was never issued owing to the fact that the appellant died before the matter was finally heard and the rule lapsed with the death of the appellant.

There is no order in the record refusing to stay the proceedings and nothing to show that such a motion was made.

It is submitted that on the face of the record it appears that the appellant is entitled to one-half of the personalty and that in the event that the action of the lower Court is affirmed that the appellant be required to pay the costs of this proceeding out of the fund due his estate.

Respectfully submitted,

CORNELIUS H. DOHERTY,  
*Attorney for Zackary Wilson, Ad-  
ministrator d. b. n. of the Estate of  
Nellie Wilson Perry, Deceased.*

Washington, D. C., February 18, 1931.

